U.S. Department of Justice

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Southern District of New York

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November 9, 2005

BY HAND

Honorable Jed S. Rakoff
United States District Judge
Southern District of New York
500 Pearl Street
New York, New York 10007

Re: Associated Press v. United States Department of Defense, 05 Civ. 3941 (JSR)

Dear Judge Rakoff:

The United States Department of Defense (DOD) respectfully submits this letter-brief concerning the October 28, 2005 Declaration of Dale T. Vitale ("Vitale Decl."), as allowed by the Court on November 2, 2005. DOD respectfully requests permission to exceed by one page the five-page limit set by the Court, in order to be able to respond to the detainee statements and habeas counsel declaration being submitted by AP.

Review of the Polling Results

Associated Press v. United States Department of Defense Doc. 36

The Court's "Notice to Detainees" (the "Notice") was distributed to 317 Guantanamo detainees, representing those detainees who had (i) given testimony to a Combatant Status Review Tribunal (CSRT), (ii) submitted a written statement to the CSRT, or (iii) provided documents to their Personal Representatives during the CSRT process, and were still at Guantanamo as of October 14, 2005. See Vitale Decl. ¶ 3. Two-thirds of the detainees polled (209 of the 317) did not return the questionnaire. Thirty-three more returned the questionnaire without answering the question asked them. See id. ¶ 4. Thus, 242 (209 + 33) of the 317 detainees – or 76% of those polled – declined to provide the information the Court requested.

Nine detainees refused to accept the Notice when it was distributed, and one detainee destroyed the Notice when it was distributed. See id. Two other detainees defaced the Notice, returning it with the text entirely stricken. See id. ¶ 4 & n.2

Sixty detainees indicated "yes, I want the identifying information about myself" described in the Notice disclosed. Fifteen detainees indicated "no, I do not want the identifying information about myself" described in the Notice disclosed. Eight of the 60 detainees who indicated yes, and four of the 15 detainees who indicated no have already had their CSRT transcripts publicly filed in connection with their habeas petitions, with identifying information about themselves left unredacted, but information about their families redacted. See id. ¶ 4; Declaration of Karen L. Hecker, dated June 30, 2005 ("Hecker Decl."), at 3 n.1.

Interpretation of the Polling Results

The Large Number of Non-Answers

As noted above, a full 76% of the detainees polled (242 out of 317) simply declined to provide an answer to the Court's question. See Vitale Decl. ¶¶ 3, 4. This large number of non-answers alone makes apparent that the polling was not effective in eliciting the detainees' views on the privacy interests implicated by DOD's invocation of FOIA Exemption 6.

The Detainees' Rejection, Destruction, and Defacement of the Notice

Among the large number of detainees who failed to answer the Court's question, twelve detainees either refused even to accept the questionnaire or destroyed or defaced it. See id. ¶ 4 & n.2. Such responses to the polling process, coupled with the large number of non-answers, confirm DOD's assessment that foreign nationals captured in wartime and held in custody by the country they were fighting is not a population that is susceptible to – much less appropriate for – a meaningful canvassing of its preferences concerning disclosure of information in a FOIA litigation in a United States court. See Second Supplemental Declaration of Karen L. Hecker, dated August 12, 2005 ("Sec. Supp. Hecker Decl.") ¶¶ 4, 8, 12, 13 (Guantanamo detainee population unsuited to meaningful informed consent process due to, among other things, detainees' distrust of DOD and limited education).

The Failure of the Notice to Ask About All the Identifying Information at Issue

The Notice did not ask the detainees whether they consent to release of (i) identifying information that appears in documents DOD provided to AP other than the CSRT transcripts, or (ii) information that would identify persons other than themselves. Thus, the detainees' answers necessarily provide no information on their positions on release of these categories of information.

First, the Notice DOD was ordered to distribute did not purport to seek the detainees' views on disclosure of identifying information contained in the detainees' written statements to the CSRT and documents they gave their Personal Representatives, the two other categories of documents (besides the CSRT transcripts) in which the identifying information sought by AP is contained.[1] Accordingly, a yes or no answer on a returned questionnaire says nothing about the detainee's position on disclosure of the identifying information at issue in those two categories of documents.

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[1] While the notice drafted by DOD under the Court's August 29, 2005 order did identify the detainees' written statements and documents given to their Personal Representatives in explaining the context of the identifying information, the Court eliminated any reference to these categories of documents from its Notice. Compare DOD "Detainee Notification and (continued...)

Likewise, the Notice did not ask detainees whether or not they consent to release of identifying information about their families or associates – only whether they consent to release of identifying information about themselves. See Notice to Detainees appended to Court's September 26, 2005 order (asking whether detainees want "the identifying information about myself released to the Associated Press"). Accordingly, a detainee's yes or no answer also says nothing about his position on disclosure of information that would identify his family, friends, or associates abroad.[2]

The Detainees' Conflicting Answers Concerning Disclosure

Finally, the polling results suggest that those detainees who did return their questionnaires did not understand what they were being asked. For example, two detainees who returned the form checked both yes and no. See Vitale Decl. ¶ 4 & n.2. Equally telling, four detainees who did not consent to release of their identifying information to AP have already had their CSRT transcripts publicly filed in their habeas cases with identifying information about them (though not about their families) unredacted. See id. ¶ 4; Hecker Decl., at 3 n.1. That these detainees refused to consent to disclosure of information that is already in the public domain makes apparent that either they did not understand what the Notice was asking, or what public disclosure had been made in their habeas cases, or both. Either way, such evident confusion provides no basis to conclude that the expression of a preference by any detainee reflects an informed decision on the disclosure AP seeks.

All of these results demonstrate that the polling process ordered by the Court did not yield information that is meaningful to the balancing analysis the Court must perform to resolve DOD's summary judgment motion. Rather, the failure of three-quarters of the detainees polled to answer the Court's question; the detainees' rejection and defacement of the questionnaires; the failure of their answers to even purport to address all the identifying information at issue as a result of the wording of the Notice; and the detainees' apparent lack of understanding of what information is already public as a result of their habeas cases and/or what information would be public should the Court order disclosure here, all reveal that the polling exercise did not yield reliable information on the detainees' views on the privacy interests at issue.

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[1](...continued)
Election Form," submitted under cover of September 2, 2005 Letter from Assistant United States Attorney Elizabeth Wolstein to Honorable Jed S. Rakoff ("DOD Proposed Detainee Notice"), with "Notice to Detainees" appended to Court's September 26, 2005 order.

[2] DOD's proposed detainee notice also attempted to inform the detainee that the information sought by AP included personal information about the detainee's "family and friends, other detainees, and people in other countries." See DOD Proposed Detainee Notice.

The Detainee Statements Offered by AP Underscore
the Unreliability of the Polling Results

The detainee statements offered by AP do not alter these conclusions. As an initial matter, the detainee statements commenting on their answers to the Notice are outside the scope of the Court's November 2, 2005 order and August 29, 2005 order directing DOD to poll the detainees. For the polling, the Court chose to ask the detainees a "single straightforward question that can be answered by checking 'yes' or 'no,'" which checkmarks would allow a "ready determination" of the detainees views. August 29, 2005 Order, at 4 & n.1. DOD objected to the procedure because, among other things, it could lead to litigation over collateral issues not contemplated by FOIA – such as the validity of a detainee's refusal to consent to disclosure. See DOD August 12, 2005 Letter-Brief, at 3-4. Nonetheless, DOD carried out the polling process in strict compliance with the Court's directives. See generally Vitale Decl. AP's submission of unreliable and untestable evidentiary material, in an effort to contest the validity of the detainees' "no" answers, now opens up collateral litigation beyond the process ordered by the Court and should be rejected.

In any event, the two detainee statements submitted by AP underscore the failure of the polling process to yield reliable answers to the Notice. The statement of detainee Mohammed Mohammed Hassen ("Hassen") makes apparent that he does not understand the nature of the disclosure that would result from a determination by the Court that the identifying information at issue is not protected by Exemption 6.[3] According to his statement, Hassen's lawyer told Hassen that AP was seeking to "release our names to the public and to no longer keep our detention a secret." Hassen Statement, at 1. In fact, it is not merely Hassen's name and the fact of his detention that would be disclosed – both of which are already a matter of public record by virtue of his habeas petition and publicly filed factual return. Rather, Hassen (and all the other detainees) would be identified with the evidence he provided to the CSRT charged with determining whether he was an enemy combatant. That a detainee whose lawyer supposedly explained the requested disclosure to him did not come away with an accurate understanding of it should not give the Court confidence that those detainees whose yes or no answers were based solely on a one-paragraph questionnaire had any better an understanding of what is at stake. Indeed, Hassen's statement confirms DOD's assessment that the detainees would neither understand the polling process devised by the Court nor trust a questionnaire distributed by DOD. See Sec. Supp. Hecker Decl. ¶¶ 4, 6-9, 11, 13; Hassen Statement at 1, 2 ("The purpose of the documents [distributed by DOD] was unclear to us . . . . We were suspicious of the government's motive and most of us refused to sign. Some of the men immediately ripped up the pages because they did not trust the military. . . . [W]e are distrustful of the U.S. military and are unlikely to sign documents – like the AP documents – that we do not understand."). Nor does Hassen's speculation that all of the other detainees share his desire for his name to be released through AP's lawsuit – even though he did not answer the questionnaire and his name is already public – have any evidentiary value for the Exemption 6 analysis.

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[3] Hassen is one of the habeas petitioners in the case captioned Abdah v. Bush, No. 04-cv-1254 (HHK), pending in the district court for the District of Columbia. See Declaration of Marc Falkoff, Esq. ("Falkoff Decl.") ¶¶ 2, 5, submitted by AP. An unclassified factual return was publicly filed in Hassen's habeas case and includes a copy of his CSRT transcript, which is unredacted except for his ISN and the name of the detainee who testified as a witness on his behalf. See Docket Sheet for Abdah v. Bush, No. 04-cv-1254 (HHK) (D.D.C.), entry number 45 (available on PACER).

The purported statement of detainee Ali Al-Hela ("Al-Hela") in fact reinforces DOD's assessment of the detainees' privacy interests at stake.[4] According to the English translation of Al-Hela's statement provided by AP, Al-Hela states that he did not answer the Court's questionnaire because he does not want his statements to the CSRT "attributed to me." Falkoff Decl. ¶ 11. This is exactly the privacy interest asserted by DOD in support of its invocation of Exemption 6. See, e.g., DOD Mem. of Law in Support of its Summary Judgment Motion ("DOD Sum. Judgt. Br."), at 16-20; Hecker Decl. ¶¶ 9-12. Indeed, at his CSRT hearing, Al-Hela stated, "I am even afraid to say what my name is." Al-Hela CSRT Transcript, at page 6 of 8 (excerpt attached hereto as exhibit A; entire transcript included in Al-Hera's publicly filed factual return, entry number 26 on docket sheet for Al-Hela v. Bush, 05-cv-1048 (RMU) (D.D.C.) (available on PACER). Nonetheless, Al-Hela's entire unredacted CSRT transcript was publicly filed in his habeas case at the urging of his habeas lawyers. See May 27, 2005 Motion for Order to Show Cause requiring government to file factual return containing record of CSRT proceedings; June 9, 2005 order granting motion, entry numbers 3 and 16 on docket sheet for Al-Hela v. Bush (both available on PACER) . While seemingly at odds with his lawyers' efforts to require the government to disclose his CSRT transcript, Al-Hela's statement here makes clear that he did not return the questionnaire exactly because he fears the consequences of having his identity linked to his statements to the CSRT.

The Polling Results Confirm That DOD's Summary Judgment Motion Is Properly Resolved, as FOIA Contemplates, Based on the Agency's Supporting Declarations

The failure of the polling procedure to yield meaningful information concerning the detainees' views on the privacy interests at issue confirms that the Court should resolve DOD's summary judgment motion as FOIA contemplates: by assessing DOD's declarations offered in support of its motion and determining, based on those declarations, whether the identifying information at issue was properly withheld. See 5 U.S.C. § 552(a)(4)(B); DOD Sum. Judgt. Br., at 12-13; DOD August 12, 2005 Letter-Brief, at 2-3; DOD Mem. of Law in Support of its Motion for Reconsideration, at 3-8.

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[4] The detainee whose name is translated in AP's submission as Ali Al-Hela is a habeas petitioner in the case captioned Al-Hela v. Bush, No. 05-cv 1048 (RMU), pending in the district court for the District of Columbia. See Falkoff Decl. ¶¶ 2, 10; Docket Sheet for Al-Hela v. Bush, No. 05-cv 1048 (RMU) (D.D.C.) (available on PACER). Al-Hela's factual return is publicly filed with the district court, and includes a fully unredacted version of his CSRT transcript. See Docket Sheet for Al-Hela v. Bush, No. 05-cv 1048 (RMU) (D.D.C.), entry number 26 (available on PACER).

While not reliable for the reasons set forth in this letter-brief and DOD's prior submissions, a particular detainee's yes or no answer to the questionnaire in any event does not settle the question whether DOD properly withheld the identifying information at issue. That determination, as the Court has recognized, turns on whether the detainees' privacy interest in the withheld information outweighs the public interest in its disclosure. See August 29, 2005 Order, at 3. As DOD has previously shown, there is no cognizable public interest in the disclosure of detainee identifying information contained in the CSRT transcripts and other CSRT documents, for such disclosure would not shed light on the government's activities in conducting the CSRTs, but would merely reveal more information about particular detainees. See United States Dep't of State v. Ray, 502 U.S. 164, 178 (1991); United States Dep't of Justice v. Reporters Committee for Freedom of the Press, 489 U.S. 749, 774-75 (1989) (while disclosure of individual's rap sheet may have "some public interest," it would not advance "the type of interest protected by the FOIA" because such disclosure "would tell us nothing" about public official's or agency's conduct) (emphasis in original); DOD Sum. Judgt. Br. at 22-25. Indeed, that absence of a cognizable public interest in the requested disclosure is dispositive in the balancing analysis, because "something, even a modest privacy interest, outweighs nothing every time." National Ass'n of Retired Fed. Employees v. Horner, 879 F.2d 873, 879 (D.C. Cir. 1989) (names and addresses of federal retirees receiving retirement benefits properly withheld under Exemption 6; reversing district court's grant of summary judgment that rested in part on district court's view that retirees "might be pleased" to receive mailings from FOIA requester).

As DOD's summary judgment papers demonstrated, a detainee's privacy interest in information the disclosure of which could result in grave harm to himself or his family is far more than modest. See Hecker Decl. ¶¶ 9-12; see also DOD Sum. Judgt. Br. at 20-21 (harm to subject of records and family members that could result from disclosure is factor in assessing privacy interest under Exemption 6). The detainees' unreliable answers to the Court's questionnaire do not undermine that showing. Rather, a balancing of the detainees' privacy interests against the absence of any public interest in disclosure of their identifying information reveals that the information was properly withheld, and that DOD's summary judgment motion, accordingly, should be granted.

Thank you for your consideration of this matter.

Respectfully,

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